72-838 FILE COPY

FILED
DEC 6 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 72-838

EDWARD A. GREER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ROBERT S. BAILEY,
53 West Jackson Boulevard,
Chicago, Illinois 60604,
Attorney for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
List of Cases	i
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statement	2
Reasons for Granting the Writ	9
Conclusion	14
Appendix (Opinion of the Court of Appeals for the Seventh Circuit)	A1

List of Cases.

Armstrong v. Manzo, 380 U. S. 545	13
Bell v. Burson, 402 U. S. 535	13
Boddie v. Connecticut, 401 U. S. 371	13
Fuentes v. Shevin, ... U. S. ..... (92 S. Ct., 1983, 1994)	13
Goldberg v. Kelly, 397 U. S. 254	13
Mulhane v. Central Hanover Trust Company, 339 U. S. 306	13
United States v. Nitti, ... F. 2d ..... (7th Cir., 1971)	4

Constitutional Provision.

Fifth Amendment to the Constitution of the United States	2, 12

IN THE

Supreme Court of the United States

No. .....

EDWARD A. GREER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petitioner, Edward A. Greer, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on August 18, 1972 affirming a judgment of conviction of Edward A. Greer previously entered in the United States District Court for the Northern District of Illinois.

OPINIONS BELOW.

There was no opinion in the District Court and its judgment is not reported. The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been officially reported but has been reproduced as an appendix.

JURISDICTION.

The judgment of the Court of Appeals affirming the judgment of conviction and sentence of the District Court was entered on August 18, 1972. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1245(1).

QUESTIONS PRESENTED.

Does due process require that petitioner have an opportunity in the District Court to meet the burden of proof concerning prosecutive misconduct first imposed by the opinion of the Court of Appeals?

CONSTITUTIONAL PROVISIONS.

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT.

Petitioner Edward A. Greer was named as a defendant in two counts of a four count indictment returned in the District Court in connection with the theft of 40,400 pounds

of copper from an interstate freight depot in Greenfield, Indiana and the subsequent distribution of the fruits of that theft. After a jury trial, a verdict of guilty and a sentence of five years on each count to run concurrently with each other, Greer appealed to the Court of Appeals for the Seventh Circuit. That Court reversed his conviction on Count Two of the indictment, the substantive count, for reasons set out in the opinion of the Court appended hereto, but affirmed his conviction on Count One, the conspiracy count of that indictment, over Greer's contentions running not only to the structure of the conspiracy with which he was charged, but as well to error occurring in the course of the trial in the District Court.

Count one of the indictment charged Greer with participation in a conspiracy along with five co-defendants and three named but unindicted co-conspirators. R. 4.[1] Three of the co-defendants, Philip Kurtz, Thomas Harty and John Carrino entered pleas of guilty prior to trial. Another, Samuel Tobias, was granted a severance on motion of the government and his case has never come to trial. The remaining co-defendant, Alphonse Bartkus, was tried to a jury along with Defendant Greer, found guilty and sentenced to incarceration for five years. R. 95. Ellis Young, an unindicted co-conspirator, was the major witness on behalf of the government at the trial. T. 227. The conspiracy alleged in count one had as its objectives violation of 18 United States Code Section 659, theft from an interstate commerce from Greenfield to Chicago of the stolen cargo and Section 2315, the subsequent concealment and disposal of the stolen property. R. 4-6.

The evidence at the trial as it pertained to the defendant Greer consisted almost entirely of the testimony of Ellis

1. We have used the notation "R" to refer to the original documents filed in the District Court as compiled by the Clerk of that Court. We have used the notation "T" to refer to the Court Reporter's transcript of proceedings.

Young. Young, also known as "Rebel", an unindicted co-conspirator who had not been charged in connection with the theft of the cargo, admitted to three prior felony convictions. T. 256. Apparently the head of a group of hijackers including the two Harty brothers and Philip Kurtz, Young testified that late in June of 1966 he received a phone call from Greer containing the cryptic message that the defendant "had something" for him. T. 232. Immediately, Young and his confederates drove in Kurtz' car to Greer's home in Carmel, Indiana near Indianapolis. T. 236. Young testified that he spoke with Greer alone in the latter's bedroom where Greer advised him that at the Daniels Motor Freight Terminal east of Indianapolis on Route 40 there was a trailer loaded with copper. T. 239. Young and his group left Greer's home.

According to Young's testimony, the four then went to Indianapolis where they stole a tractor and proceeded to Greenfield where, utilizing the stolen tractor, Robert Harty attached it to the trailer and drove the stolen rig to Chicago followed by Tom Harty, Kurtz and Young in the automobile. T. 245. They took the stolen trailer tn an address at Adams and Franklin Streets in Chicago where they were met by Carrino. Carrino as well as Young testified to the hiring of day laborers and the unloading of approximately 30,000 pounds of the stolen copper into a warehouse. T. 248, 333. The thieves then took the trailer and parked it at another location and returned to Ellis Young's apartment, where they called Nitti. Harty and Nitti subsequently took the trailer to a garage owned by Tobias. T. 250. Because the trailer was too large for the garage, the same two individuals, Harty and Nitti, then took the trailer to a location in Cicero, Illinois, where it and its contents were ultimately recovered by agents of the FBI. T. 158, 372. See *United States* v. *Nitti*, ... F. 2d ..... (7th Cir., 1971). The copper in the warehouse which Carrino and Bartkus had rented, remained there.

Carrino testified that Bartkus told him some weeks later that it had to be moved. T. 339. According to Carrino, Bartkus subsequently gave him $2,700.00, explaining that he had sold the copper for $3,000.00 and retained $300.00 to cover his expenses. Carrino visited Ellis Young and Tom Harty and delivered the $2,700.00. T. 339.

Young testified that after Carrino paid him the money he and Harty returned to Indianapolis and called Greer for the purpose of arranging a meeting at which they intended to pay him a portion of the proceeds. T. 253. Still according to Young, however, Greer never showed up to collect. Young testified to a subsequent phone call in which Greer allegedly offered to assist Young in collecting for the stolen load. T. 254. With the exception of one, perhaps two, insignificant phone calls, there was no evidence of any connection between Greer and the stolen copper, its theft or distribution subsequent to the initial contact with the thieves.

The only evidence which the government offered in support of Young's testimony with respect to Greer consisted of the testimony of John Benton, the FBI agent who arrested Greer in Indianapolis after the return of the indictment. T. 301. Benton testified that upon interrogation Greer stated first that he knew Ellis Young and second that he had talked to him by telephone since Young's release from the penitentiary. T. 313, 314. Both those facts Greer admitted when he took the stand as a witness in his own defense. T. 426, 436.

The other item of corroboration the government offered consisted of a bondsman's card which a police officer seized from Ellis Young upon arresting him in 1966 pursuant to a warrant from Iowa. T. 166. On the back of that card were listed three telephone numbers, two located in Greer's home in Carmel, Indiana and the third listed to the parking garage Greer operated in downtown Indianapolis at the time. T. 200 et seq.

There was considerable additional evidence offered by the government at the trial, none of it relating to the guilt or innocence of the plaintiff Greer. It concerned the renting of the warehouse at Adams & Franklin Streets by Bartkus and Carrino, the unloading of the stolen trailer at that location by the four thieves assisted by Carrino and day laborers hired from Manpower, Inc., T. 135, 173, the police surveillance of Harty and Nitti at the Tobias garage, T. 158, and the eventual seizure of the trailer in Cicero. T. 392. There was the usual unexceptional proof of the interstate nature of the shipment, its point of origin, its destination, and its value. T. 21 et seq.

The driver, Allen Hercamp, testified to the details of his trip from the point of origin in Rome, New York as far as Greenfield. T. 62. En route he experienced four flat tires resulting in two completely unscheduled delays. Unexpected transmission trouble eventually required him to leave the trailer at the depot in Greenfield while he took his tractor to be repaired. Upon calling the terminal the following day to discuss the repairs to his tractor with the terminal manager, Clyde Smith, the theft was discovered and reported to the police by Smith. T. 388. Both Hercamp and Smith denied having told anyone, particularly Greer, about the location or contents of the trailer.

The evidence offered on behalf of the defendant Greer consisted of his own testimony and two additional witnesses. Greer stated that he had met Ellis Young sometime previously at the federal penitentiary at Terre Haute. Upon his release he had returned to the parking garage business in Indianapolis which proved quite successful. He heard from Young again when on Memorial Day, 1966, Young and his wife visited Greer at his home in Carmel. T. 428. Subsequent to that visit, Greer stated that he left Indiana for Florida on June 16, 1966 returning on July 6. T. 430-434. The interim was spent at various locations in Florida visit-

ing his daughter who was then living with his estranged wife and visiting friends in Ft. Myers. T. 431. One week was spent at the hunting lodge deep in the Everglades where Greer was accompanied by an old friend, Carl Miller. T. 433. Miller's testimony supported Greer's to the extent of the Everglades trip. T. 476.

The other witness for the defendant was one Morris Evans. T. 403. That individual testified that during 1965 he lost his motel business and was stranded with no place to live. Greer took Evans into his home in Carmel and permitted him to live there as a general handyman. During June of 1966 while Greer was in Florida, Evans testified he was watching television when three or four men, one of whom was named Rebel, entered the house uninvited. He stated that the men remained for three or four days and then departed. T. 405-7. During Greer's absence, Evans recalled, the water pump broke and he called Greer in Florida to ask what action he should take. Greer told him to have the pump repaired. T. 407. It was during this conversation, according to Evans, that he advised Greer of the visit. Greer told him that he knew the man named Rebel. Greer testified that when he returned and discussed the visit with Evans in more detail, he called Young in Chicago and advised him that he did not appreciate visitors when he wasn't home. T. 436.

Upon that testimony the defendant Greer rested. The co-defendant Bartkus rested immediately thereafter without offering any testimony whatever. Although the prosecutor had previously been advised by the Judge, T. 386, that he should have his rebuttal witnesses ready to take the witness stand immediately upon the conclusion of the defense, he requested, in front of the jury, additional time for the explicit purpose of flying a rebuttal witness to Chicago from Florida. T. 488. That request was denied and the prosecutor presented one minor rebuttal

witness. T. 489. He then made a second request for additional time to produce some unidentified rebuttal witness from Florida. Once again, the trial judge denied the request and closed the evidence. T. 496.

The jury's verdict of guilty against both of the defendants was returned on April 17, 1970. Post trial motions were denied and on May 21 of the same year the defendant Greer was sentenced to incarceration in the custody of the attorney general for a period of five years on each count to run concurrently. R. 96. From that judgment and sentence he appealed to the United States Court of Appeals for the Seventh Circuit. That Court's opinion concluded that the conviction of the violation set out in Count Two of the indictment was unsupported and Greer's conviction as to that count was reversed without remand. The Court held, however, that his conviction of the conspiracy count, Count One of the indictment, was warranted by the evidence in the case and it accordingly affirmed the five year sentence imposed on that count. In the course of its opinion the Court of Appeals found that our contentions on behalf of the defendant Greer relating to trial error and prosecutive misconduct did not require the reversal of his convictions and a remand for a new trial.

Indisposing of the most serious allegations of prosecutorial misconduct, the opinion of the Court of Appeals stated as follows:

> "In addition, Greer alleges misconduct when, at the conclusion of the defense, the prosecutor requested, in the presence of the jury, a continuance 'to get a witness to fly up here from Ft. Meyer, Florida.' The judge turned down the request and required that all rebuttal testimony be concluded that day. Greer maintains that the request was a ploy on the part of the prosecutor who, having only discovered Greer's Florida alibi that afternoon, could not have had time to find a rebuttal witness in Florida. *If the defense had shown positively*

> *that there was no such witness at the time the request was made, or if the Government had so conceded, the prosecutor's remarks would clearly warrant reversal.* However, we cannot assume duplicity on the part of the Government solely on the strength of Greer's charges. Since no such showing was made, we cannot sustain a finding of misconduct." Sl. Op. 11 [Italics added.]

Petition for rehearing was filed in the Court of Appeals specifically directing that Court's attention to the segment of its opinion quoted above and specifically contending that petitioner Greer had had no opportunity to prove that in fact the prosecutor had no witness in Florida when he made the statement to which Greer took objection.

The petition for rehearing pointed out that no evidentiary hearing had ever been held in the District Court to determine whether or not in fact the prosecutor had such a witness as he represented to the Court that he could produce before the jury. Petition for rehearing was denied and this petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT.

After the government's evidence-in-chief had concluded, there was a colloquy between counsel and the Court with respect to scheduling the remainder of the trial. The Court indicated that the trial would have to be completed within the following day and a half, and defense counsel estimated the length of time their cases would take to present. The trial judge advised the prosecutor that he would require him to proceed immediately with any rebuttal evidence at the conclusion of the defense case. T. 386. The defendant Greer then put on his evidence.

At the conclusion of Greer's defense, Bartkus rested without offering any evidence at all. At that point the trial

judge inquired whether the prosecutor desired to present any rebuttal evidence. In response the prosecutor stated:

> "MR. CAGNEY: Yes, we have one witness here and one tomorrow.
>
> THE COURT: Not tomorrow morning, conclude this afternoon.
>
> MR. CAGNEY: Based on what I heard here this afternoon, it will take me tonight *to get the witness to fly up here from Ft. Meyer, Florida.*
>
> MR. BAILEY: I object.
>
> THE COURT: You will conclude your rebuttal within a half hour. That's all I will allow. Proceed." T. 488. [Italics added.]

The prosecutor then produced Young's wife to give some very short testimony in rebuttal and following the cross-examination of her, the prosecutor again requested additional time to produce a witness to rebut the Florida testimony. T. 495.

We respectfully submit that the prosecutor's remarks in the presence of the jury, implying that he had a witness in Florida who was capable of rebutting the defendant's alibi evidence constituted a serious impropriety requiring a reversal of his conviction and a remand for a new trial. The prosecutor, without producing a witness, advised the jury that he had one and indicated what his testimony would have been. In fact, there was no witness.

When he made his request for time to fly his rebuttal witness in from Florida, the prosecutor could not possibly have known whether such a witness existed or not. He had heard for the first time on that same afternoon the testimony of the defendant and the two defense witnesses, Evans and Miller. How could he be aware, sitting in a courtroom, whether anyone existed in Florida who could have contradicted their testimony?

In addition, the prosecutor was also aware that the Court had previously stated unequivocally that the prosecutor would be required to proceed immediately with his rebuttal evidence. He did not know whether or not any witness existed; he knew very well that the Court would not permit a recess or continuance for the purpose of investigation. Nevertheless, the prosecutor deliberately asked for time and implied to the jury that his devastating, if nonexistent witness could be produced to testify the next morning. His statement alone was more prejudicial to Greer than the testimony of any witness the government could have produced.

The real vice of the prosecutor's dubious trial tactics lies in the effect upon the jury of such statements made by a representative of the government. The jury was well aware of the extent of the investigative apparatus available to a federal prosecutor. It may well have surmised on the basis of the prosecutor's comments that all of the details of the defendant Greer's sojourn in Florida had previously been checked out by agents of the FBI and, in fact, that the defendant had lied about them. That supposed lie, however, could be proved only if there were time to bring the FBI agent from Florida to testify. Nothing, of course, could be further from the truth than those conclusions. This Court should not permit convictions to be obtained by such questionable tactics.

The Court of Appeals recognized in its opinion that the remarks of the prosecutor would have warranted reversal if in fact no such witness existed in Florida at the time the remark was made. We quote from the opinion:

> "In addition, Greer alleges misconduct when, at the conclusion of the defense, the prosecutor requested, in the presence of the jury, a continuance 'to get a witness to fly up here from Ft. Meyer, Florida.' The judge turned down the request and required that all rebuttal testimony be concluded that day. Greer main-

tains that the request was a ploy on the part of the prosecutor who, having only discovered Greer's Florida alibi that afternoon, could not have had time to find a rebuttal witness in Florida. *If the defense had shown positively that there was no such witness at the time the request was made, or if the Government had so conceded, the prosecutor's remarks would clearly warrant reversal.* However, we cannot assume duplicity on the part of the Government solely on the strength of Greer's charges. Since no such showing was made we cannot sustain a finding of misconduct." Sl. Op. 11 [Italics added.]

Specifically, we point out that the defendant Greer has had no opportunity in either Court below to make the kind of positive showing the opinion of the Court of Appeals appears to require. Accordingly, in our petition for rehearing in the Court of Appeals, we sought solely a remand to the District Court for the conduct of an evidentiary hearing at which we would be provided with an opportunity to make such a showing on Greer's behalf. We believe that that constituted the most expeditious method of providing Greer with a constitutionally required opportunity to demonstrate the impropriety of the prosecutive tactics in his case. The Court of Appeals refused to "assume duplicity on the part of the Government". We suggested the total absence of any need for assumptions in either direction. All we asked was an opportunity to prove our view of the affair by evidence in Court. Nonetheless, our petition for rehearing was denied and we have had no such opportunity at any stage of these proceedings.

The Fifth Amendment, we suggest, requires some opportunity to defendant Greer to prove his contentions which, according to the opinion of the Court of Appeals, would, if true, be sufficient to generate a reversal of his conviction. Anything less denies due process.

"Many controversies have rages about the cryptic and abstract words of the due process clause, but there can

> be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mulhane* v. *Central Hanover Trust Company,* 339 U. S. 306, 313.

Such a hearing, in addition, must, to avoid doing violence to due process, be a meaningful hearing. *Armstrong* v. *Manzo,* 380 U. S. 545.

This Court only last term stated:

> "[T]he constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking . . ." *Fuentes* v. *Shevin,* ..... U. S. ..... (92 C. Ct. 1984, 1994).

Fuentes was not, of course, a criminal case but the opinion does serve to indicate the importance attaching to the due process concept of opportunity to be heard. *Bell* v. *Burson,* 402 U. S. 535; *Boddie* v. *Connecticut,* 401 U. S. 371; *Goldberg* v. *Kelly,* 397 U. S. 254. The fact that this is a criminal case subject to the jury trial and other requirements of the Sixth Amendment does not move it beyond the reach of Fifth Amendment due process. On the contrary, standards of due process in criminal cases ought rightly to be more demanding than in civil cases. The conduct of a government seeking to deprive one of its citizens of liberty ought to meet a higher standard of fairness than the conduct of a government seeking merely to revoke a driver's license, or determine a welfare claim.

The defendant Greer first learned that he had a burden to prove that the prosecutor, in fact, had no witness in Florida when he made his remark, for the first time when the opinion of the Court of Appeals was published. No authority is cited in the opinion to support imposing such a burden upon a defendant. What Greer seeks, however, is not to contest the burden the Court has thrust upon him, but to have an opportunity to discharge it. But the

novelty of the burden the Court of Appeals imposed has due process consequences of its own. Individuals met by sudden and unanticipated changes in the procedures and standards they expected to be utilized in determining their rights must be accorded an opportunity to at least meet new requirements. In this instance, since the Court of Appeals imposed a burden of proof upon petitioner, he had every right to expect an opportunity to discharge it. We respectfully submit that Fifth Amendment due process requires that the petition for writ of certiorari be granted, the judgment of the Court of Appeals for the Seventh Circuit eventually vacated, and the cause remanded to the District Court for a hearing at which petitioner is to be accorded the opportunity to prove what he contended, viz, that the prosecutor had no witness in Florida and that his case, in fact, met the standards of the Court of Appeals for reversal on the ground of prosecutive misconduct.

CONCLUSION.

Because the Court of Appeals imposed upon the petitioner a burden of proof which he had no opportunity to discharge in connection with the misconduct of the prosecutor and because such a denial of an opportunity to be heard denies due process, we respectfully petition this Court to issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ROBERT S. BAILEY,
53 West Jackson Boulevard,
Chicago, Illinois 60604,
Attorney for Petitioner.

December, 1972.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

September Term, 1971 — April Session, 1972

Nos. 18583, 18584
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

EDWARD A. GREER and ALPHONSE P. BARTKUS,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 68-CR-780
William J. Campbell, *Judge.*

Argued April 3, 1972—Decided August 18, 1972

Before SWYGERT, *Chief Judge* KILEY and PELL, *Circuit Judges.*

SWYGERT, *Chief Judge.* This is an appeal from the conviction of two defendants arising out of the theft of 40,400 pounds of copper from an interstate freight depot in Greenfield, Indiana. Defendants Edward A. Greer and Alphonse P. Bartkus were each named in two counts of the four-count indictment. Count One charged the defendants, four codefendants, and three named but unindicted coconspirators, with participation in a conspiracy having

three unlawful objectives—stealing from an interstate shipment of copper in violation of 18 U. S. C. § 659, transportation of the cargo in interstate commerce in violation of 18 U. S. C. § 2314, and concealing the stolen cargo in violation of 18 U. S. C. § 2315. Count Two charged Greer and two codefendants with the substantive violation of 18 U. S. C. § 2314, transporting copper from Greenfield to Chicago knowing it to have been stolen. Count Three charged Bartkus and one other codefendant with concealing and disposing of cargo they knew to have been stolen in derogation of 18 U. S. C. § 2315. Only Bartkus and Greer proceeded to trial since three codefendants entered pleas of guilty and another was granted a severance on motion of the Government. Both defendants were found guilty by the jury as charged. Post-trial motions were denied and each was sentenced to the custody of the Attorney General for concurrent terms of five years.

Greer contests the sufficiency of the evidence to sustain his conviction under Counts One and Two, the constitutional propriety of venue for Count Two in the Northern District of Illinois, and cites several trial errors stemming from the prosecutor's conduct and the joinder of Greer's case with that of Bartkus. Bartkus joins in Greer's challenges "where applicable" and additionally charges error arising from the prosecutor's closing remarks.

A brief outline of the evidence is in order. The principal witness for the Government was Ellis Young, an unindicted coconspirator. Young testified that while at home in Chicago in June 1966 he received a phone call from Greer in which Greer stated that he "had something" for Young. Young, joined by Phillip Kurtz and Thomas Harty, two codefendants, and Robert Harty, an unindicted coconspirator, drove from Chicago to Greer's home in Carmel, Indiana. Young related Greer's statement: "He told me he had a little copper, the driver was broken down

and had transmission trouble, and that we would have three days with the load, if we could handle it." Greer further described the load of copper and its location.

Young, the Hartys, and Kurtz proceeded to Indianapolis where they stole a tractor from B & M Leasing Company for use in the theft of the copper. After stealing the copper from a disabled trailer in the Daniels Motor Freight Terminal in Greenfield, they drove to Chicago. In Chicago they were met by John Carrino, another codefendant, who led them to the warehouse space he had rented. Since they were unable to unload all the copper, Young contacted Frank Nitti, an unindicted coconspirator, to arrange for the disposition of the remaining portion. Nitti reported to Young that he would store the copper in the garage of Samuel Tobias, a codefendant. When Tobias' garage proved to be too small, the stolen truck and trailer were sent to another location in Chicago where they were recovered by Federal Bureau of Investigation agents.

Young also related two phone conversations with Greer after the theft had occurred. He stated that Greer called him to inquire where the money from the sale of the copper was being kept. He then described calling Greer to arrange a meeting for the purpose of distributing the proceeds. According to Young, however, Greer never appeared to claim his share.

The Government also called Carrino to testify as to the renting of the warehouse and the sale of the copper remaining in the warehouse. He implicated Alphonse Bartkus by describing Bartkus' role in finding a place to store the copper.[1] He also described a subsequent conversation with Young in which he informed Young that the load was "hot," that he had been forced by Bartkus to have it removed, and that Bartkus had been instrumental in its disposition.

1. This was corroborated by the testimony of an officer of the association that owned the building in which the load was stored.

The remainder of the Government's case consisted of witnesses who described the interstate character of the copper shipment, its point of origin, its destination, and its value. Allen Hercamp, a truck driver employed by the Daniels Motor Freight Company, testified to carrying a load of copper belonging to Revere Copper and Brass, Inc. from Rome, New York, destined for St. Louis. Repairs to his truck necessitated stopping in Greenfield on June 27, 1966 and storing the trailer containing the copper in the local Daniels terminal. Hercamp testified that he next saw the trailer in Cicero, Illinois, at which time most of its load was missing.

Counsel for Bartkus presented no witnesses on Bartkus' behalf. Greer offered several witnesses who testified to his presence in Florida when the offense was committed. Morris Evans stated that in June 1966 several men visited Greer's Carmel home, including a man nicknamed "Rebel," which was Young's nickname, while Greer was away and Evans was temporarily living there. According to Evans, when Greer returned from Florida he called Young in Chicago to express his disapproval of Young's visits to his home in his absence. Greer also took the stand and described his first meeting with Young when both were incarcerated in the federal penitentiary in Terre Haute and a later meeting in Greer's home on Memorial Day in 1966. He then related the details of his stay in Florida between June 16 and July 6, 1966.[2] In addition, Clyde Smith, the manager of the Daniels terminal in Greenfield was called to the stand and, though he admitted knowing Greer, denied having told anyone about the location or contents of the shipment.

I.

Greer claims that this evidence is insufficient to support the substantive charge in Count Two of the indictment

2. One of Greer's witnesses, Carl Miller, testified to being with Greer in Florida during part of this period.

that he "did transport and cause to be transported in interstate commerce" 40,400 pounds of copper which he knew to have been stolen. The Government's theory is that Greer aided and abetted in the transportation of the copper and, as such, under 18 U. S. C. § 2, is liable as a principal for the offense. According to the defense, the evidence supports only a charge of aiding and abetting the copper's theft, but not aiding and abetting transportation of the copper; lacking proof that Greer knew of the thieves' plans for the interstate conveyance of the copper, the Government may not charge him with complicity in its transportation. The Government's position is that an "aider and abettor" is responsible not only for the other likely consequences of his acts. Since transportation of the stolen goods was a foreseeable consequence of their theft, the Government need not show specific intent to aid in this act. In addition, the Government maintains that knowledge of the interstate component of a criminal act is never a prerequisite to a finding of criminal liability.

We think the Government's standard for one who aids and abets a crime far to broad. Congress specifically provided for three separate crimes: theft of goods which were in interstate commerce (18 U. S. C. § 659), the transportation of stolen goods in interstate commerce (18 U. S. C. § 2314), and the knowing sale of such goods (18 U. S. C. § 2315). Since transportation and disposition of stolen goods are always "likely" consequences of their theft, the Government's standard effectively obliterates these distinctions. No matter what a defendant's participation was in the initial theft, he becomes responsible for all subsequent "likely" stages. Under this approach, the cumulation of punishments will always be an important danger.

Moreover, the Government's standard contradicts the prevailing case law on aiding and abetting. The seminal case is *United States* v. *Peoni*, 100 F. 2d 401, 402 (2d Cir.

1938), in which Judge Learned Hand states that aiding and abetting requires that the defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."[3] This suggests two general components of aiding and abetting—an act on the part of a defendant which contributes to the execution of a crime and the intent to aid in its commission. Analysis is complicated, however, where there is an extended course of criminal conduct and where, though the defendant's participation is limited to one stage, he is charged with aiding and abetting a subsequent one. We must then consider how far accomplice liability can be extended to include crimes other than the one (or ones) the accomplice immediately aided.

Accomplice liability is necessarily limited by the general principles of criminal liability. To allow a jury to infer an intent to aid in the commission of one offense from the demonstrated intent to aid in another earlier offense because the later crime is a foreseeable consequence of the earlier one, is to base cirminal liability only on a showing of negligence rather than criminal intent. MODEL PENAL CODE § 2.04, Comment (Tent. Draft No. 1, 1953). The court will relax the intent component of aiding and abetting in a limited number of situations. We agree, for instance, that a defendant can be held responsible as an aider and abettor of a crime even where there is no direct proof that he intended to aid in the crime, if he is substantially involved in the chain of events leading immediately to it. Thus, the driver of a "getaway" car during a robbery who intends only to aid in the theft, can be charged with the crime of transporting the stolen goods although his participation in the subsequent transportation was inadvertent. The requisite in-

3. *See United States* v. *Varelli*, 407 F. 2d 735 (7th Cir. 1969); *United States* v. *Turnipseed*, 272 F. 2d 106 (7th Cir. 1959).

tent may be inferred when the defendant's physical participation in the course of events is substantial.[4] But where the relationship between the defendant's acts and the ultimate crime for which he is charged is as attenuated as it is in the instant case, we would require some showing of specific intent to aid in, or specific knowledge of, the crime charged.

Greer's participation was limited to triggering the theft by providing the thieves with information about the copper. Young testified that Greer alerted him to the existence of the copper, described its location, and later, after the theft, phoned him in order to claim the proceeds. Since the Government does not claim Greer was physically present at the crime, Greer's participation amounts to that of an "accessory before the fact."[5] As such, in order to prove Greer's complicity with the later stages of the crime—namely, the transportation of the goods—the Government must show that he intended to aid in post-theft plans, or that he knew details of the thieves' travel plans, such as the specific destination of the goods. Since the Government made no such showing, we find the proof insufficient to sustain a conviction on this count.[6]

---

4. There are two additional situations in which the intent requirement for accomplice liability is relaxed, the felony-murder and misdemeanor-manslaughter situations. Aiding in the commission of a felony which results in an unintended death subjects the accomplice to liability for murder.

5. 18 U. S. C. § 2 abolished the differentials in punishment that resulted from characterizing a defendant as an accessory before or after the fact, or as a principal. The common law characterizations are useful, however, in determining when a defendant's participation is sufficient to make him an accomplice and thus to require the application of this section. *United States* v. *Pritchard*, 55 F. Supp. 201 (W. D. S. C.), *aff'd*, 145 F. 2d 240 (4th Cir. 1944).

6. Since we are overturning Greer's conviction under Count Two, we need not reach his argument on the constitutional impropriety of venue in the Northern District of Illinois under that count.

II

Greer also argues that the evidence is insufficient to sustain his conviction under Count One, the conspiracy count. He maintains that Count One charges multiple conspiracies since it includes "subsequent receivers" of stolen goods, and since it alleges as one of the objects of the conspiracy the transportation of the goods in interstate commerce. Greer contends that the only conspiracy with which he could have been charged is one whose sole object was the theft of the copper, and whose sole participants were himself and the four codefendants directly involved in the theft.

The claim that Greer had no "connection" with four of his alleged coconspirators does not, by itself, sustain the charge of multiple conspiracies. Conspiracy law does not require a direct connection with coconspirators in the sense of person-to-person communication, or even specific knowledge of their identities. Once the "essential nature of the plan" is discovered, and the defendant's adherence to it shown, ignorance of some of the participants in that plan does not relieve the defendant of liability. *Blumenthal* v. *United States*, 332 U. S. 539 (1947). The rule has its most cogent restatement in *United States* v. *Andolschek*, 142 F. 2d 503, 507 (2d Cir. 1944):

> It is true that a party to a conspiracy need not know the identity, or even the number of his confederates; when he embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them. Nevertheless, he must be aware of those purposes, must accept them and their implication, if he is to be charged with what others may do in execution of them.

Accord, United States v. *Battaglia*, 394 F. 2d 304, 311 (7th Cir. 1968), *cert. denied*, 401 U. S. 924 (1971). Knowledge

of additional participants is inferred from the nature of the plan to which the defendant has consented.

This is the case even in so-called "chain conspiracies" in which participants who may not know precisely of each other's existence perform different activities in sequence. *See, e.g.*, Note, *Federal Treatment of Multiple Conspiracies*, 57 COL. L. REV. 390 (1957). Thus, in *United States* v. *Bruno*, 105 F. 2d 921 (2d Cir.), *rev'd on other grounds*, 308 U. S. 287 (1939), where the court found the common plan required the participation of additional parties, the defendant was held to be part of a single conspiracy composed of smugglers of narcotics, several middlemen, and two groups of retailers. *See also, Blumenthal* v. *United States, supra.* Greer, however, points to cases in which courts have hesitated to characterize ultimate purchasers or sellers of stolen goods as conspirators with those immediately involved in the criminal venture. *Braico* v. *United States*, 442 F. 2d 543 (7th Cir.), *cert. denied*, 398 U. S. 912 (1970); *United States* v. *Ford*, 324 F. 2d 950 (7th Cir. 1963). The instant case, we believe, presents no such difficulties. Those participants whom Greer calls "subsequent receivers" were far more involved in the entire undertaking than were the buyers in *Braico* and *Ford* whose responsibilities began and ended with the exchange of money for goods. Since a trailer filled with 40,400 pounds of copper was involved here, disposition required elaborate arrangements and a great deal of contact with the principal thieves. Moreover, the difficulties of finding complicity between those at the end of the chain and those immediately involved in the venture, may not apply as between those at the beginning of the chain, who may be characterized as instigators of the plot, and subsequent participants. Greer's argument, which is the apparent converse of *Braico* and *Ford*, is deficient since the instigator of a chain could readily fall within the rule of *Andolschek* as one who

"embarks upon a criminal venture of indefinite outline." 142 F. 2d at 507.

The fundamental question is what the defendant assented to and whether that assent can be construed as including subsequent participants and their activities. This kind of analysis is simplified where the conspiracy alleged focuses only on a single object as in *Blumenthal* v. *United States, supra.* However, a conspiracy with multiple objects and multiple parties can also be held to constitute a single conspiracy as long as the objects are integrally related, such that "the success of that part with which [the defendant] was immediately concerned, was dependent upon the success of the whole." *United States* v. *Bruno,* 105 F. 2d at 922. *Cf. Kotteakos* v. *United States,* 328 U. S. 750, 768 (1946).[7] In the instant case, the objects of the conspiracy—theft, transportation, and disposition—are indispensable to the success of the entire venture. As we have indicated, theft of 40,400 pounds of copper required planning and cooperation; each "link" in the scheme must have assumed that the unlawful venture could not stop with their task alone. Thus we infer consent to the later, indispensable stages from Greer's consent to the preliminary ones.

On the face of it, this seems inconsistent with our analysis of aiding and abetting. We have stated that while Greer is liable as a conspirator to steal, transport, and dispose of the copper, his liability as an accomplice can extend only to the theft. However, this apparent inconsistency is resolved when the nature of conspiracy law is analyzed. The nub of a conspiracy is agreement. Conspiracy, it is suggested, is more than a species of inchoate crime; conspir-

7. In *United States* v. *Battaglia,* 394 F. 2d 304 (7th Cir. 1968), *cert. denied,* 401 U. S. 924 (1971), the dissent was based upon the belief that the two objects of the conspiracy, fraud and extortion, were not integrally related. The dissent found that the defendant could be held to have consented only to fraud, while extortion was a product of the individual initiative of a codefendant.

ators are held liable for setting up a structure which becomes the continuing focal point for crimes. Society adjudges itself harmed not only by the attainment of the unlawful objectives of the conspiracy but by the conspiracy's very existence which the law regards as making attainment of unlawful objectives more likely than in the case of individual action. *Developments in the Law—Criminal Conspiracy,* 72 HARV. L. REV. 920 (1959). Hence, we may infer agreement to transport and dispose of the copper from complicity in a structure that readily led to that end where we do not infer intent to commit the same substantive crimes.[8] Though there are definite and important limits to a conspirator's liability, *see, e.g., Kotteakos* v. *United States, supra* at 773, that liability is not as circumscribed as the liability of an accomplice.[9]

In addition, Greer attacks the validity of his conviction under Count One based on the Government's failure to show that the defendant knew of the "interstate character of the copper shipment" or was aware of its subsequent interstate transportation. While Greer concedes that knowledge of the interstate component of the crime is not a necessary element of the substantive crime charged, he suggests a different standard for conspiracy. We find no support for this position in the opinions of this circuit.

8. Our holding would be different, however, if Greer were charged with participation in a conspiracy whose *sole* object was the transportation of the copper or its disposition. *Developments in the Law—Criminal Conspiracy,* 72 HARV. L. REV. 920, 939 (1959); *Pettibone* v. *United States,* 148 U. S. 197 (1893); *Fulbright* v. *United States,* 91 F. 2d 210 (8th Cir. 1937). The distinction made is between a general conspiracy with myriad objects, some of which the defendant was directly involved in, and a specific conspiracy to commit a particular substantive offense.

9. While this interpretation does make it more likely that defendants will be charged with conspiracies to violate all three sections of the Act, that consequence is less severe where the punishment is levied for participation in a single conspiracy rather than for participation in three separate substantive crimes.

In *United States* v. *Pranno*, 385 F. 2d 387, 389 (7th Cir. 1967), *cert. denied*, 390 U. S. 944 (1968), the court stated: "All that must be proved . . . is that defendants conspired to commit extortion, and that the natural effect of carrying out their threat, whether they were conscious of it or not, would affect commerce." *See United States* v. *Battaglia*, *supra*. The holding of the Supreme Court in *In re Coy*, 127 U. S. 731 (1888), and dicta in *Screws* v. *United States*, 325 U. S. 91, 106 (1945), suggest the same conclusion. *See*, *Developments in the Law—Criminal Conspiracy*, *supra* at 937.

III

We turn now to the trial errors alleged by both defendants, Greer and Bartkus. We find the claim of misjoinder of the trials of Greer and Bartkus to be without merit. Greer's argument that most of the evidence introduced at trial dealt with matters with which he had "no connection whatever" is rooted in his attack on the conspiracy count, an attack we have not sustained. In any event, under the standards of *United States* v. *Tanner*, ... F. 2d ..... (7th Cir. 1971), more must be proved if the defendant is to meet his burden of demonstrating prejudice.

In addition, Greer points to several instances of alleged prosecutor misconduct. He notes statements made by the prosecutor in which he used the pronoun, "I." While we have repeatedly underscored the prosecutor's responsibility for keeping his personal opinion out of the proceedings, reversal is not automatic upon appearance of the pronoun, "I." Upon examination it appears that in each statement the prosecutor was only restating the Government's theory of impeachment as to the particular witness involved. There was no suggestion of personal knowledge above and beyond the evidence before the jury. Greer also cites the prosecutor's comment about the testimony of Clyde Smith,

"Isn't it possible that we didn't believe Clyde Smith?" The defense, however, invited that response by specifically charging that the Government did not call Smith because they knew he would not implicate Greer. *See Lawn* v. *United States,* 355 U. S. 339, 359 n. 15 (1957).

In addition, Greer alleges misconduct when, at the conclusion of the defense, the prosecutor requested, in the presence of the jury, a continuance "to get a witness to fly up here from Ft. Meyer, Florida." The judge turned down the request and required that all rebuttal testimony be concluded that day. Greer maintains that the request was a ploy on the part of the prosecutor who, having only discovered Greer's Florida alibi that afternoon, could not have had time to find a rebuttal witness in Florida. If the defense had shown positively that there was no such witness at the time the request was made, or if the Government had so conceded, the prosecutor's remarks would clearly warrant reversal. However, we cannot assume duplicity on the part of the Government solely on the strength of Greer's charges. Since no such showing was made, we cannot sustain a finding of misconduct.

IV

Finally, Bartkus claims that the prosecutor erred by commenting on his failure to take the stand in violation of 18 U. S. C. § 3481 and the fifth amendment. The Government answers that Bartkus' attorney invited such comment in his own closing remarks and that, in any event, the record of this case suggests that whatever misconduct took place in this regard was "harmless." Bartkus' attorney had stated:

> Now as His Honor told you, it is up to those who bring the accusation to prove that accusation beyond

a reasonable doubt. It is not for the defendant to prove anything. Certainly not for a defendant in this country to have to prove his innocence, and so in any criminal case it becomes, at the end of the case, not the defendant's, but his lawyer's decision as to whether or not he testifies. That is my decision in this case.

During the prosecutor's closing remarks the following colloquy occurred:

Mr. Cagney: Mr. Maloney told you, ladies and gentlemen, and he told you what ostensibly his reasons were. But I say to you you were not bound to what he told you.

There are other considerations that enter an attorney's mind why the man might not testify.

Mr. Maloney: I again want to object, for the record, your Honor.

The Court: Overruled.

We do not agree that the remarks of Bartkus' attorney justified the prosecutor's' response. The defense counsel was doing no more than attempting to discount the natural, though impermissible, inferences of guilt that juries draw from a defendant's failure to take the stand. He restated the relevant law—that the burden of proof is on the prosecution, that the defendant need not come forth with evidence until the prosecution meets that burden—and then implied that as a result there were technical reasons for a defendant's failure to testify which a lawyer must consider. Under these circumstances, the rule that an advocate may by his comments invite a response from his opponent in an area ordinarily outside the purview of the closing remarks is inapplicable. *See United States* v. *Guajardo-Melendez*, 401 F. 2d 35 (7th Cir. 1968). Certainly we cannot legitimize what in other instances would be prosecutorial misconduct because the defendant chose to reiterate the law relating to a defend-

ant's failure to testify. Of course, our analysis would be different if the defense counsel's remarks could be interpreted as advancing specific reasons for his client's failure to testify or as implying that the defendant wanted to testify but was prevented from doing so by his attorney. But we find that neither interpretation is warranted by the defense counsel's statements.

If the prosecutor had limited his response to the remark that the jurors "were not bound to what he [Bartkus' attorney] told you," we would have found no error. That remark was innocuous since it was apparently directed more to the attorney's credibility than to the defendant's actions. However, the prosecutor's second statement, that "[t]here are other considerations that enter an attorney's mind why the man might not testify," does amount to a suggestion—albeit a vague one—that the attorney's trial tactics were prompted by the defendant's guilt. Impermissible prosecutorial comment has been quite broadly defined. "[W]hether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Hayes* v. *United States*, 368 F. 2d 814, 816 (9th Cir. 1966). Though the question is a close one, we hold that the prosecutor's remarks are improper.

Ordinarily this violation is a serious one and warrants reversal. *See, e.g., Griffin* v. *California*, 380 U. S. 609, *rehearing denied*, 381 U. S. 957 (1965); *United States* v. *Ward*, 168 F. 2d 226 (3d Cir. 1948). However, we agree with the Government that in this instance the prosecutor's error was harmless beyond a reasonable doubt under the rule of *Chapman* v. *California*, 386 U. S. 18 (1967). Bartkus' attorney requested and obtained adequate curative instructions from the trial judge. Moreover, a review of the record indicates that the case against Bartkus was overwhelming.

Accordingly, we affirm Bartkus' conviction under Counts One and Three of the indictment. We also affirm Greer's conviction for conspiracy under Count One, but reverse his conviction for aiding and abetting under Count Two.[10]

PELL, *Circuit Judge,* concurring.

I concur in and approve of Chief Judge Swygert's opinion with the exception of part IV thereof as to which I concur that if there had been error it was harmless, but respectfully I cannot concur that the prosecutor's challenged remarks were erroneous.

I do not read the remarks of Bartkus' attorney as does Judge Swygert. I fail to find any indication in the remarks that there were technical reasons for the defendant's failure to testify which his lawyer had to consider.

It is stated in Judge Swygert's opinion that the attorney restated the relevant law—"that the burden of proof is on the prosecution, that the defendant need not come forth with evidence until the prosecution meets that burden."

However, aside from the question of whether there is ever any need (other than practical ones) for a defendant to come forth with evidence, the remarks only say that the burden of proof beyond a reasonable doubt is on the prosecution and the defendant does not have to prove anything including his innocence. If counsel had stopped there I could not find he had opened any doors to prosecutorial comment.

He did not stop, however, but switched from the matter of burden of proof to who made the decision as to whether the defendant would testify. I read in this a clear message to the jury to the effect that Bartkus was willing but his

10. Even though Greer was sentenced to concurrent terms on the two counts, we do not think that either resentencing or retrial on the remaining valid count is warranted under the standards articulated in *United States* v. *Tanner,* ..... F. 2d ..... (7th Cir. 1971).

attorney was not and therefore he did not testify. The next reasonable step of the inferential process in the jury's minds would be that the defendant could have testified to his innocence but that he was not permitted to do so by his lawyer as it "is not for the defendant to prove anything."

I do not find the prosecutor's statement entirely responsive to defense counsel's remarks as defense counsel did not really tell the "jury what ostensibly his reasons were." This part of his remarks, however, is apparently found to be innocuous.

The challenge is to that part to the effect that there were other considerations that enter an attorney's mind "why the man might not testify." It appears to me that when the defense counsel states in effect, "I did not let him testify," leaving open as he did here the implication that the defendant otherwise might have testified, the prosecutor is not entering an area of impropriety in the general remark concerning "other considerations."

I have expressed my opinion herein notwithstanding the fact that I am concurring in the result on his particular matter, as I feel it is unfortunate to put the stamp of approval of this court on the remarks of the defense counsel since similar remarks with the implications I see therein may well be made in cases where liability is a close question. The decision here would preclude the prosecutor from responding, thus leaving an improper implication unchallenged.

Here both attorneys used general language and the implications in the remarks of each were equally vague. I would hold that the prosecutor's remarks were clearly invited and that the acceptance did not exceed the bounds of the invitation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 6, 1972

Before

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 18583 *vs.*

EDWARD A. GREER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(68 CA 780)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby *denied.*

A True Copy:
Teste:

(SEAL)

/s/ JOSEPH E. HITS,
Deputy Clerk of the United States Court of Appeals for the Seventh Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-838

EDWARD A. GREER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial with one Bartkus in the United States District Court for the Northern District of Illinois, petitioner was convicted of having transported between Greenfield, Indiana, and Chicago, Illinois, over 40,000 pounds of copper known to have been stolen from an interstate shipment, in violation of 18 U.S.C. 2314 (count 2) and of having conspired to steal the copper, conceal, and transport it in violation of 18

U.S.C. 371 (count 1).[1] He received concurrent sentences of five years' imprisonment. The court of appeals affirmed petitioner's convictions on count 1 but reversed his conviction on count 2 on grounds of insufficient evidence (Pet. App. A; 467 F. 2d 1064).

The evidence, the sufficiency of which is not challenged here, is outlined in the opinion of the court below (Pet. App. A2-A4). Petitioner's sole contention in this Court is that the prosecutor was guilty of misconduct when in the jury's presence he requested a continuance to obtain a rebuttal witness from Florida. The court below stated that if the petitioner had shown positively that there was no such witness (or if the government conceded there was none), this remark would warrant reversal (Pet. App. A13). Petitioner now claims that the court below should have remanded for a hearing to determine whether a witness in fact existed.

The circumstances surrounding petitioner's claim are as follows. On the final day of testimony, petitioner offered two alibi witnesses who testified to his presence in Florida when the offense was committed. After the defense rested, the court asked the prosecutor whether he wished to present any rebuttal evidence. The following colloquy then ensued in the presence of the jury (Tr. 488):

> MR. CAGNEY [the prosecutor]: Yes, we have one witness here and one tomorrow.
>
> THE COURT: Not tomorrow morning, conclude this afternoon.

[1] Co-defendant Bartkus was also convicted on each count. Three other co-defendants pleaded guilty. A fourth co-defendant was granted a severance on motion of the government.

MR CAGNEY: Based on what I heard here this afternoon, it will take me tonight to get the witness to fly up here from Ft. Meyer, Florida.

MR. BAILEY [petitioner's counsel]: I object.

THE COURT: You will conclude your rebuttal within a half hour. That's all I will allow. Proceed.

The prosecutor then called the rebuttal witness who was present. After this witness was cross-examined, the prosecutor once more asked for additional time to fly a witness up from Florida; the court again denied the request (Tr. 495).

Petitioner's contention (Pet. 13-14) that the court below imposed a novel burden upon him, which he has had no opportunity to discharge, is not well founded. There is no novelty in requiring that lawyers make the nature of their objections clear, and give the trial court a reasonable opportunity to take appropriate action. Petitioner now conjectures that the rebuttal witness in Florida was a fiction, and the request for continuance was simply a device to suggest to the jury that such a witness existed. As far as the record shows, counsel's objection at trial was directed to the grant of the extension, not to the good faith of the reason given for the request. If he doubted the good faith foundation for the request, he should have clearly so stated. The trial court could then readily have ascertained the identity of the potential witness. The court of appeals was not required to remand for a determination the petitioner failed to secure originally, due to the ambiguity of his objection. No further review by this Court is appropriate.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

☆ U.S. Government Printing Office: 1973—493-794/488